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Yale Kamisar

University of Michigan Law School, ykamisar@umich.edu

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**FRANCIS A. ALLEN: "CONFRONT[ING] THE
MOST EXPLOSIVE PROBLEMS" AND
"PLUMBING ALL ISSUES TO THEIR
FULL DEPTH WITHOUT FEAR OR
PREJUDICE"†**

*Yale Kamisar**

Frank Allen began his distinguished teaching career more than thirty-five years ago — at a time when, at more law schools than we like to remember, "the basic criminal law course was routinely assigned to the youngest and most vulnerable member of the faculty or to that colleague suspected of mild brain damage and hence incompetent to deal with courses that really matter."¹ That those of us who taught criminal law years later were warmly received by our colleagues is in no small measure a tribute to the quality of mind and character and intellectual energy of people like Allen, Herbert Wechsler, Louis Schwartz, Edward Barrett, Sanford Kadish, and Frank Remington.

The list of Allen's distinctions, accomplishments, and contributions is long. Where should one begin? Reasonable people will differ, but I would point first to his two-year stint as Chairman of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1961-63). Attorney General Robert Kennedy put it well when he said of the Allen Report (as it has come to be called) that its "comprehensive study and challenging recommendations" "honor[] the finest traditions of our profession."²

† Cf. Currie, *Law and the Future: Legal Education*, 51 NW. U. L. REV. 258, 271 (1956) (quoted at length in text at note 90 *infra*).

* Henry K. Ransom Professor of Law, University of Michigan. A.B. 1950, New York University; LL.B. 1954, Columbia University. — Ed.

1. Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 816 (1977).

2. Letter from Attorney General Robert Kennedy to Professor Francis Allen, March 28, 1963, set forth in the introduction to REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963) [hereinafter ALLEN REPORT]. Although portions of the Allen Report extracted at note 5 *infra* were quoted with approval in *Escobedo v. Illinois*, 378 U.S. 478, 490 n.13 (1964), and *Miranda v. Arizona*, 384 U.S. 436, 472-73 n.41 (1966), the Report appeared too late to be mentioned in *Gideon v. Wainwright*, 372 U.S. 335 (1963). But the *Gideon* Court, 372 U.S. at 338 n.2, did cite an earlier work by Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1959) (one of a series of papers submitted by members of the University of Chicago law faculty to the Conference of Chief Justices in August 1958). In this paper, Allen discussed the pre-*Gideon* development of the right to counsel at considerable length, *id.* at 223-33, and

The Allen Report and its accompanying draft of proposed legislation led to the much-needed Criminal Justice Act of 1964.³ More generally, and more important, the Report significantly affected our way of thinking about the obligations of "equal justice" and the problems faced by criminal defendants of limited means.

Frank Allen is a thinker and a doer. He is also a splendid writer. Again, reasonable people will differ, but I think his best writing is to be found in the Allen Report. The Report underscored that the elimination, or at least the minimization, of the influence of poverty in the administration of criminal justice "involves more than an expression of humanitarian sentiment or the extension of public charity."⁴ No one has ever said it better:

[G]overnmental obligation to deal effectively with problems of poverty in the administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity. It does not presuppose a general commitment on the part of the federal government to relieve impoverished persons of the consequences of limited means, whenever or however manifested. . . .

The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. . . . When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his pov-

criticized the cases decided "under the *Betts-Bute* formula," *Betts v. Brady*, 316 U.S. 455 (1942); *Bute v. Illinois*, 333 U.S. 640 (1948), as "distinguished neither by the consistency of their results nor by the cogency of their argument." Allen, *supra*, at 230.

The *Gideon* Court might also have referred to Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 197 (1958), where Allen assailed the distinction the Court had drawn between capital cases (where a "flat requirement" of appointed counsel was recognized) and noncapital felony cases (where an indigent defendant had to establish that the absence of counsel deprived him of a "fair trial") as "lack[ing] integrity." For "the important consideration seems less the penalties that may be imposed than the *need* for skilled representation," and "most murder cases, in which capital penalties are involved, are by no means the most difficult to try or those in which representation is most urgently required." The seeds of the Allen Report may be found in the 1958 *Wayne Law Review* article's discussion of the meaning and scope of "equal justice," *id.* at 198-200; see also Allen, Book Review, 24 U. CHI. L. REV. 779, 780-81 (1957).

3. 18 U.S.C. § 3006A (1982).

4. ALLEN REPORT, *supra* note 2, at 8. Compare, e.g., the rationale of a state official, quoted in Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 78 (1963), for not applying the newly established *Gideon* principle to *any* misdemeanor case: "Society has no duty to go that far. A man may have a right to dental care at state expense, but not to gold inlays."

erty, it may properly be required to minimize the influence of poverty on its administration of justice.

The Committee, therefore, conceives the obligation of government less as an undertaking to eliminate "discrimination" against a class of accused persons and more as a broad commitment by government to rid its processes of all influences that tend to defeat the ends a system of justice is intended to serve. . . .

. . . .
 . . . The adversary system is the institution devised by our legal order for the proper reconciliation of public and private interests in the crucial areas of penal regulation. As such, it makes essential and invaluable contributions to the maintenance of the free society.

The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. We believe that the system is imperiled by the large numbers of accused persons unable to employ counsel or to meet even modest bail requirements and by the large, but indeterminate, numbers of persons, able to pay some part of the costs of defense, but unable to finance a full and proper defense.⁵

The Report of the Attorney General's Committee was hardly Allen's only contribution to the improvement of justice. He was Drafting Chairman of the Illinois Criminal Code of 1961. He was a member of the Advisory Committee to the National Institute on Law Enforcement and Criminal Justice (1974-78) and a consultant to the President's Commission on Law Enforcement and the Administration of Justice (1965-66). He served on the Board of Directors of the American Bar Foundation. He was also a member of the Council of the American Law Institute and an adviser to two of the Institute's most important and time-consuming projects: the Model Penal Code and the Model Code of Pre-Arrest Procedure.⁶

Although Allen has many friends and admirers on the bench and in government service and private practice, he has even more in academia. This is hardly surprising. To begin with, in the course of nearly four decades of teaching, he has graced the law faculties of five universities (in chronological order, Northwestern, Harvard, the Uni-

5. ALLEN REPORT, *supra* note 2, at 9-10.

6. Moreover, Allen's contributions to the administration of justice came not only through his writings. See, for example, Robert Burt's account elsewhere in this issue of Allen's representation of a person committed to a mental institution under what turned out to be an unconstitutional statute. Burt, *What Frank Allen Teaches*, 85 MICH. L. REV. 391 (1986).

versity of Chicago, the University of Michigan, and now the University of Florida). In addition, he has served as President of the Association of American Law Schools and of the National Order of the Coif. Moreover, Allen enjoys visiting and speaking at other law schools, and because of his renown as a scholar and his prowess as a speaker he has had no shortage of opportunities to do so. Indeed, I venture to say that there are not ten law professors in this century who have delivered as many endowed lectures (or as many of the most prestigious ones). At this writing, he is about to give his *twelfth*.⁷

As already indicated, Allen cares a good deal about the larger world outside the classroom and the library, but he also cares deeply about liberal and professional education (as evidenced by his many thoughtful speeches and essays on the subject).⁸ His interest in legal education was no doubt whetted by his service as dean of the University of Michigan Law School from 1965 to 1971, a time of unprecedented student unrest and a time when Allen's civility, patience, wisdom, and large capacity for fairness stood him in good stead.⁹

Allen considers "[t]he preservation and extension of an intellectually based and humanistically motivated legal education . . . the greatest challenge facing American law schools."¹⁰ "What we have to fear," he warns us, "is a narrowing of minds and concerns" — a "lower[ing] [of] aspirations for intellectual quality and service to the larger society."¹¹ He continues:

We can accept, with only slight emendation, the proposition formulated by John Stuart Mill over a century ago: "As often as a study is cultivated by narrow minds, they will draw narrow conclusions. . . . The only security against narrowness is a liberal mental cultivation, and all it

7. In chronological order, Allen was Hepburn Lecturer, Wayne State University (1958); Marx Lecturer, University of Cincinnati (1966); Holmes Lecturer, Harvard University (1973); Baum Lecturer, University of Illinois (1975); Wythe Lecturer, College of William and Mary (1976); Alumni Distinguished Lecturer in Jurisprudence, University of Tennessee (1977); Sibley Lecturer, University of Georgia (1978); Storrs Lecturer, Yale University (1979); Caplan Lecturer, University of Pittsburgh (1981); Siebenthaler Lecturer, Northern Kentucky University (1982); Murray Lecturer, University of Iowa (1984); and Marks Lecturer, University of Arizona (scheduled 1987). In addition, Allen was the Russel Lecturer at the University of Michigan in 1979. This annual lectureship is the highest honor given to a senior faculty member by the University of Michigan. Since the establishment of the Russel Lectureship in 1925, only two members of the law faculty, Allen and the late Paul Kauper, have received this honor.

On Allen's lectures and essays, see, in this issue, Kadish, *Francis A. Allen — An Appreciation*, 85 MICH. L. REV. 401 (1986).

8. Most of Allen's thoughts on the subject, written at intervals over nearly thirty years, are collected in F. ALLEN, *LAW, INTELLECT, AND EDUCATION* (1979).

9. On Allen's deanship during troubled times, see, in this issue, Sandalow, *Francis A. Allen*, 85 MICH. L. REV. 385 (1986).

10. F. ALLEN, *The New Anti-Intellectualism in American Legal Education*, in *LAW, INTELLECT, AND EDUCATION* 59, 75 (1979).

11. *Id.*

proves is that a person is not likely to be a good political economist who is nothing else." For the phrase "good political economist" let the sentence read "good lawyer."¹²

As anyone familiar with Allen's work will testify, he himself is a product of the kind of "intellectually based and humanistically motivated legal education" he seeks to preserve and to extend. He is that rare individual who "possess[es] both culture and expert knowledge in some special direction" and is thus well equipped to explore the problems within his area of expertise with intensity and in breadth.¹³

Actually, Allen has expert knowledge in a number of "special directions" (juvenile justice, criminology, criminal corrections, legal education, and various aspects of substantive criminal law, constitutional law, and family law). In this brief tribute, however, I shall dwell on only one of his areas of expertise, the one I know best — criminal procedure.

As far as criminal procedure is concerned, Frank Allen was the right person at the right time. In his first year of teaching, the Court handed down the famous case of *Wolf v. Colorado*.¹⁴ The Court held that the protection against unreasonable search and seizure was "basic to a free society" and thus "enforceable against the States through the Due Process Clause."¹⁵ But it went on to say that the sanction applied in federal prosecutions — exclusion of the evidence obtained in violation of the right — was not binding on the states.¹⁶ Although it was to be overruled a decade later,¹⁷ the *Wolf* case, as I have maintained elsewhere, "significantly changed our way of thinking about the [exclusionary] rule — and probably for all time."¹⁸

By "driving a wedge between [the protection against unreasonable searches and seizures] and the exclusionary rule,"¹⁹ and by "inject[ing] the instrumental rationale of deterrence of police misconduct into its discussion of the exclusionary rule,"²⁰ the *Wolf* opinion not only made

12. *Id.* The reference is to J.S. MILL, AUGUSTE COMTE AND POSITIVISM 82-83 (1961 ed.).

13. *Cf.* A. WHITEHEAD, THE AIMS OF EDUCATION 13 (Mentor ed. 1949).

14. 338 U.S. 25 (1949).

15. 338 U.S. at 27-28.

16. 338 U.S. at 28, 31-33.

17. *Mapp v. Ohio*, 367 U.S. 643 (1961).

18. Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 606 (1983). The title of the article comes from an observation in Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 537: "[U]ntil the [exclusionary] rule rests on a principled basis rather than an empirical proposition, [the rule] will remain in a state of unstable equilibrium."

19. Mertens & Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 380 (1981).

20. *Id.* at 379.

the result reached in that case seem more palatable, but it planted the seeds of destruction for the exclusionary rule — in federal as well as state cases.²¹

The *Wolf* Court, per Frankfurter, J., had “no hesitation in saying that were a State affirmatively to sanction [violation of the security of one’s privacy against arbitrary intrusion by the police] it would run counter to the guaranty of the Fourteenth Amendment.”²² But —

the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.²³

We cannot . . . regard it as a departure from basic standards to remand [persons upon whom incriminating evidence has been found] together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below [due process] a State’s reliance upon other methods which, if consistently enforced, would be equally effective.²⁴

Young Frank Allen (he was thirty-one at the time he published his article on the *Wolf* case) was not impressed:

[T]he most expanded view of what practical consequences may fairly be expected to flow from the recognition by the [*Wolf* majority] of a federal right of privacy indicates only a small area in which federal power is likely to be employed to give that right meaning and reality. . . .

This deference to local authority . . . stands in marked contrast to the position of the Court in other cases arising within the last decade involving rights “basic to a free society.” It seems safe to assert that in no other area of civil liberties litigation is there evidence that the Court has

21. When *Mapp* overruled *Wolf*, it seemed to repair the damage to the exclusionary rule caused by the earlier case. See note 26 *infra*. But in declining to give *Mapp* full retroactive effect, *Linkletter v. Walker*, 381 U.S. 618 (1965), revived *Wolf*’s way of thinking about the exclusionary rule. The *Linkletter* Court passed over the notion that a court should not ratify or make itself a participant in lawless conduct and rested the exclusionary rule solely on an empirical basis. The “deterrence” rationale and its concomitant “interest balancing” bloomed in *United States v. Calandra*, 414 U.S. 338 (1974), strongly criticized in Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974), and ever since then the “deterrence” rationale has clearly been in the ascendancy. As Justice Brennan recently observed, dissenting in *United States v. Leon*, 468 U.S. 897, 943 (1984) (briefly discussed in note 26 *infra*), “by basing the [exclusionary] rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics.”

22. 338 U.S. at 28.

23. 338 U.S. at 28.

24. 338 U.S. at 31.

construed the obligations of federalism to require so high a degree of judicial self-abnegation. . . . [I]t is clear that unless one is content to view the rights of privacy under the Fourteenth Amendment as merely Platonic abstractions, the reality and content of such rights are determined by the aggregate of available remedies and enforcement devices through which the interest of the individual and the community in the preservation of the rights of privacy may be asserted. The effect, therefore, of leaving to the states virtual freedom in framing devices for the enforcement of the federal prohibition against unreasonable searches and seizures is to leave to the states the power to give (or withhold) content and reality to the federal right.²⁵

Although the *Wolf* majority "stoutly adhere[d]" to the federal exclusionary rule,²⁶ it maintained that there were

reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.²⁷

Again, Allen was skeptical:

One answer that might be suggested . . . is that [Justice Frankfurter's] argument at this point might better be directed to the question of whether a federal right of privacy should be recognized at all. But simply as a statement of fact, it may be doubted that the proposition is generally valid. Even assuming that local police activities are subjected to closer public scrutiny than many of those of, say, the Federal Bureau of Investigation, the optimistic belief that informed public opinion tends to

25. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 11-12 (1950).

26. 338 U.S. at 28. But the *Wolf* Court could not resist taking a sideswipe at the federal rule: [T]hough we have interpreted the Fourth Amendment to forbid the admission of [evidence obtained by unreasonable searches or seizures], a different question would be presented if Congress . . . were to pass a statute purporting to negate the [federal exclusionary rule]. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own.
338 U.S. at 33.

Twenty-five years ago, Allen assured us that the suggestion in *Wolf* that the exclusionary rule is but a judicially created rule of evidence that Congress might negate "does not survive the *Mapp* decision." Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 24. But ways of thinking about the fourth amendment exclusionary rule have changed. Now that the rule rests on an "empirical proposition" rather than a "principled basis," cf. note 18 *supra*; now that application of the rule "presents a question not of rights, but of remedies," a question to be answered by weighing the "potential injury" caused by the rule against its "potential benefits," *United States v. Calandra*, 414 U.S. 338, 349, 354 (1974); and now that, on the basis of that "cost-benefit analysis," the Court has finally carved out a "good faith" (actually a "reasonable mistake") exception to the rule in its central application, *United States v. Leon*, 468 U.S. 897 (1984), the rule seems especially vulnerable to "legislative repeal," most likely "replacement" by legislation that provides what we shall be assured is an "effective" tort remedy.

27. 338 U.S. at 32-33.

a more effective check on abuse by police under the domination of a powerful local political machine seems hardly founded on empirical evidence. Such evidence as is available forms little basis for sanguine hopes as to the effectiveness of public opinion, without more, in checking police abuse at the local level [citing various reports, books and articles]. Again it should be noted, in no other area in the civil liberties cases has the Court felt justified in trusting to public protest for protection of basic personal rights. Indeed, since the rights of privacy are usually asserted by those charged with crime and since the demands of efficient law enforcement are so insistent, it would seem that reliance on public opinion in these cases can be less justified than in almost any other²⁸

Why did the *Wolf* Court place so much reliance on "other methods" of enforcing the protection against unreasonable search and seizure but in *three confession cases decided the same day* reject as constitutionally irrelevant state reliance on such other means of protection (e.g., tort actions, criminal prosecutions, and internal police discipline) against unconstitutional interrogation practices?²⁹ The *Wolf* opinion is conspicuous for its failure to reconcile the search and seizure cases with those involving inadmissible confessions. Indeed, the *Wolf* opinion does not even allude to the confession cases. But they pervade Allen's classic article on *Wolf*:

Any basic consideration of unreasonable search and seizure soon identifies it as an integral part of a broader problem. The third degree, the unlawful arrest, the official invasion of individual privacy each represent abuses of the public force by officers charged with enforcement of the law — abuses which must be controlled if values that have been thought to be of importance are to be maintained. Each springs from common motivations and common impulses. Attempts to treat any single species of such abuse as isolated and unrelated phenomena are likely to produce partial and unsatisfactory results. Consistency of approach to problems so intimately related would seem to be a matter of considerable importance.³⁰

* * *

Justification of the exclusion of "coerced" confessions on the ground of the untrustworthiness of such evidence has frequently been made. . . .

. . . .

[But the] concept of due process as it has developed in the latter-day confession cases is clearly based upon considerations which go beyond a concern that the defendant in the particular case shall not be convicted on unreliable and untrustworthy evidence. This expansion of constitu-

28. Allen, *supra* note 25, at 12-13.

29. *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949). The three confession cases decided the same day as *Wolf* cannot be distinguished on the ground that they involved the admissibility of unreliable evidence. For the state courts had allowed into evidence independently corroborated and hence trustworthy, albeit "involuntary," confessions.

30. Allen, *supra* note 25, at 25.

tional doctrine, while probably incapable of explanation in terms of any single factor, seems to have been motivated in principal part by a deep-seated judicial suspicion of law-enforcement procedures which require the holding of suspects in secret police custody for extended periods of time. . . .

. . . .
. . . [C]learly [in the confession cases arising from the state courts], the Court under the limitations of the due process clause has been seeking to strike down police procedures which in their general application appear to the prevailing justices as imperiling basic individual immunities. Clearly, also, the Court has not construed the obligations of federalism as precluding such an effort even though the results . . . have been obviously at odds with local conceptions of proper police behavior.

But insofar as many of such considerations continue to be deemed relevant to the problem of the admissibility of [confessions] in state criminal proceedings, it becomes progressively more difficult to distinguish the problem of the admission of evidence seized in violation of individual rights of privacy. For in the latter as in the former situation the Court is dealing with police practices which in their general operation are destructive of basic individual rights. It would seem that the perils to an "accusatorial" system of criminal justice in the use of evidence illegally seized from the privacy of the defendant's home may be quite as real as those arising from the use of evidence extracted from the lips of a suspect following a period of prolonged interrogation in secret police custody. In both situations the perils arise primarily out of the procedures employed to acquire the evidence rather than from dangers of the incompetency of the evidence so acquired. Furthermore, if the demands of federalism are not such as deny to the Court power to supervise the interrogatory practices of state police officers in the interest of procedures most likely to preserve the integrity of basic individual immunities, such supervision of police practices in the interest of preserving basic rights of privacy seems likewise justifiable. Yet the consequence of the decision of the Court in the *Wolf* case is rigidly to separate the two problems and to create a dubious double standard in the definition of the requirements of due process as they relate to state criminal proceedings.³¹

When, five years after it had declined to impose the exclusionary rule on the states as a matter of fourteenth amendment due process, the Court upheld the admissibility of the evidence in *Irvine v. California*,³² the *Wolf* doctrine appeared to be more firmly imbedded in the law than when first promulgated. For the police conduct challenged in *Irvine* was "almost incredible": "That officers of the law would break and enter a home, [install a concealed microphone], even in a bedroom, and listen to the conversations of the occupants for over a month would be almost incredible if it were not admitted."³³

31. *Id.* at 25-29.

32. 347 U.S. 128 (1954).

33. 347 U.S. at 132.

The author of *Wolf* dissented in *Irvine*, insisting that *Wolf* was distinguishable:

[W]hat is decisive here . . . is additional aggravating conduct which the Court finds repulsive.

....

. . . Surely the Court does not propose to announce a new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials.³⁴

But Justice Jackson, who wrote the principal opinion in *Irvine*, declined "to make inroads upon *Wolf* by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock is more serious, the states must exclude the evidence."³⁵ As Jackson saw it, the search involved in *Wolf* "was offensive to the law in the same respect, if not the same degree, as here."³⁶

Irvine seemed to be a dramatic example of "[t]he tendency of a principle to expand itself to the limits of its logic."³⁷ But sometimes a principle is never so vulnerable as when it is so expanded:

The *Irvine* case is of critical importance in the history of the *Wolf* doctrine. It expressed the most stringent view of the limitations on federal judicial power associated with that doctrine. At the same time, it probably contributed more to the ultimate downfall of *Wolf* than any other holding of the Court.³⁸

* * *

The result in the *Irvine* case stands in opposition to the main trends of doctrinal development since the decision of *Powell v. Alabama*. Since, by the Court's own characterization, *Irvine* was the victim of an egregious violation of his federal constitutional rights, more might have been expected from the Court than an ineffectual suggestion that the offending state officers might be prosecuted under federal civil-rights legislation. . . . That a contrary decision in *Irvine* would have indefinitely forestalled imposing the exclusionary rule on the states in all search and seizure cases can obviously not be asserted with assurance. But the demonstrated incapacity of the *Wolf* doctrine to meet the problem of the egregious wrong must be regarded as an important milestone on the road to *Mapp*.³⁹

Those of us who employ a different style may still admire Frank Allen's way. He shared the actions of his times, but not the passions. An Allen article on an important new development or controversy,

34. 347 U.S. at 144-46 (Frankfurter, J., dissenting).

35. 347 U.S. at 133-34.

36. 347 U.S. at 133.

37. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

38. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 7.

39. *Id.* at 9-10 (footnote omitted).

even when among the first on the subject to appear in print, strikes one as "the sober second thought."⁴⁰ His criticism can be quite powerful, but his prose is measured and restrained. And his treatment of an issue, however explosive, is evenhanded and openminded.

Allen is sometimes disheartened,⁴¹ on rare occasions even taken aback,⁴² but never outraged. In the twenty years we were colleagues at the University of Michigan I came to know him well. And one who reads the work of a person he knows well can hear his voice, even see the expression on his face. At times Allen raises his eyebrows, but never his voice.

In criticizing *Wolf* he expressed no anger. In commenting, a decade later, on the case that overruled *Wolf* he showed no elation. Indeed, his response to the overruling of *Wolf* was quite subdued:

That the Court's action will be extravagantly praised and extravagantly condemned seems entirely predictable. Both reactions are entitled to be met with some skepticism. The *Mapp* holding will force a period of painful adjustment and accommodation in many states. There is no reason to believe, however, that the accommodation cannot be made or that, in making it, state and local law enforcement will be rendered incapable of performing its essential functions. On the other hand,

40. Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 26 (1962).

41. See, e.g., Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 541-42 (footnotes omitted):

[T]he slowness and perversity of legislative response to the problems of criminal justice is often disheartening. The attitudes revealed by Congress in the Omnibus Crime Control Bill of 1968 are illustrative. One example will suffice. In the closing years of the Warren tenure the Court decided several cases extending the right to counsel to police line-up identification procedures. The Court was wholly right in recognizing the problem of misidentification as a central one in the administration of criminal justice. The problem here is not that of releasing an obviously guilty defendant because of the system's failure to respect his rights. On the contrary, the problem is one of convicting the innocent. Studies reveal that misidentification may well be the greatest peril confronting the innocent person caught up in the criminal process. Whatever the values of the right to counsel in these procedures — and opinions differ — no one is likely to regard it as a sufficient solution to these problems. Alternative devices, possibly including the removal of identification procedures entirely from the police and placing them in the hands of an expert and neutral administrative agency, are required. Congress' rejection of the Court's solution is not surprising. The fact that it contented itself with simply attempting a legislative repeal of the Court's decision without offering anything to deal with the critical problem the Court had identified is deplorable. Yet this is what occurred.

42. See, e.g., Allen's response, Allen, *Foreword — Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & CRIMINOLOGY 391, 398 (1975), to the assertion in *United States v. Peltier*, 422 U.S. 531, 537 (1975) (Rehnquist, J.), that "if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence" of materials seized in ways later found to violate the fourth amendment:

[T]here will be many who feel that Justice Rehnquist's version of the "imperative of judicial integrity" trivializes the concept. Undoubtedly, conscious wrongdoing by the police is a source of aggravation. But even if the police were unaware of the illegality, the judges are not. And it is the admission of evidence known by judges to have been obtained in violation of constitutional right that gives rise to the ethical concern expressed in the phrase, the "imperative of judicial integrity."

one may doubt that the holding makes as substantial a contribution to the protection of individual rights as the majority of the Court appears to assume. This is true, in part, because the exclusionary rule is based on a theory of the causes of police misconduct that is partial and unsatisfactory. The fact remains that the administration of criminal justice is primarily a function of the local government. The causes for abuses of the function must be sought in the pathologies of local government, and elimination of these ills must be accomplished primarily at the local level.⁴³

It is no exaggeration to say, as one commentator did, that Frank Allen "anticipated virtually every argument [for extending the federal exclusionary rule to the states] advanced by the Court in *Mapp v. Ohio*"⁴⁴ (at least every persuasive one). Nevertheless, Allen did not spare the "opinion of the Court"⁴⁵ overruling *Wolf*.

In declining to impose the exclusionary rule on the states, the *Wolf* Court, per Frankfurter, J., had regarded the widespread rejection of the rule by the states as highly significant in defining the requirements of the due process clause.⁴⁶ In response, the *Mapp* Court, per Clark, J., picked up on a point the Court had made a year earlier when it had called the movement in the states toward the exclusionary rule "halt-ing but seemingly inexorable."⁴⁷ "While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule," reported Justice Clark, now "more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the [exclusionary] rule. Significantly, among those now following the rule is California"⁴⁸

Despite his unhappiness with *Wolf*, Allen found it "difficult to believe" that this particular argument for overturning that landmark case "convinced any but the already persuaded."⁴⁹ Nor, although the California Supreme Court had relied heavily on Allen's own writings in adopting the exclusionary rule as a matter of state law,⁵⁰ did he

43. Allen, *supra* note 38, at 47-48.

44. Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 666 n.13 (1961).

45. "The opinion submitted by Mr. Justice Clark was denominated the 'opinion of the Court,' but . . . one of the grounds of the holding had less than majority support." Allen, *supra* note 38, at 22.

46. See 338 U.S. at 29-33.

47. *Elkins v. United States*, 364 U.S. 206, 219 (1960) (Stewart, J.).

48. *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (citations omitted).

49. Allen, *supra* note 38, at 27.

50. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955) (Traynor, J.). In the course of his opinion, one of the best ever written on the exclusionary rule, see, e.g., Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CALIF. L. REV. 103, 107 (1965), Justice Traynor referred to Allen's 1950 article on the *Wolf* case five times. He also referred to another Allen

attach great significance to the "conversion of California":

[I]f evidence of reluctance on the part of the states to accept the exclusionary rule is deemed "basically relevant" to disposition of the constitutional question, it can hardly be denied that the evidence is still strong; and this is so even though the obduracy of New York is now balanced by the conversion of California. Moreover, it is far from clear which way the argument cuts. For, after all, the "seemingly inexorable" drift toward the exclusionary rule occurred under the regime not only of *Wolf* but of *Wolf* as interpreted by *Irvine*. Assuming that general acceptance of the exclusionary rule is the consummation to be desired, might not the trend have been permitted to continue? The substantial attainment of the objective through local volition might appear to have particular attractions for a political system that presumably attaches more than verbal significance to the values of local self-determination. Indeed, the point can fairly be made that the clearest achievements of the Court in raising the standards of state criminal procedures . . . have occurred precisely in those situations in which the supervision of the Court has induced such constructive local response. Even if it were felt that additional stimulus was required, the result in *Mapp* does not appear inevitable. The overruling of *Irvine*, rather than of *Wolf v. Colorado*, might well have induced a movement toward the exclusionary rule no less "inexorable," yet less "halting."⁵¹

Allen's evenhandedness and openmindedness is also evidenced by his response to the *Mapp* Court's reliance on the coerced confession cases. One of the grounds the *Mapp* Court advanced for holding that "the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege,"⁵² namely, the exclusionary rule, was essentially the point Allen had made in his 1950 article:

[W]e are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. . . . This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government . . . the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of

article, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U. L. REV. 16 (1953). Of course, it is not simply a matter of citation numbers. More significant is the similarity of the two men's reasoning. I doubt that anyone familiar with Allen's work and Traynor's *Cahan* opinion could help but conclude that the professor had an enormous influence on the judge. A decade earlier, Traynor had written the opinion of the California Supreme Court reaffirming the admissibility of illegally seized evidence in that state, *People v. Gonzales*, 20 Cal. 2d 165, 124 P.2d 44, cert. denied, 317 U.S. 657 (1942). On that earlier occasion Justice Traynor may have been unduly influenced by the then state attorney general (Earl Warren).

51. Allen, *supra* note 38, at 28-29 (footnotes omitted).

52. 367 U.S. at 656.

goods, papers, effects, documents, etc.? . . . [The confession rule and the exclusionary rule in the search cases] enjoy an "intimate relation" [Both are aimed at assuring] that no man is to be convicted on unconstitutional evidence.⁵³

But in 1961 Allen had second thoughts about the application of the confession cases to the search and seizure area. After all, the term "unreasonable search and seizure" covers a multitude of sins. It runs the gamut from relatively minor infractions to the "almost incredible" invasions of privacy that occurred in *Irvine*. Thus, in 1961 Allen voiced doubts whether

the analogy of the confession cases fully supports the argument of the [*Mapp*] Court. For while the deterrence of police misconduct may be accepted as among the objectives of both the confession rule and the exclusionary rule, and while in both areas reliable evidence of guilt may be barred from the trial, there is often a substantial difference in the seriousness of police misconduct in the two classes of cases. Not all violations of the right of privacy are trivial or inconsequential, as *Irvine* and *Mapp* amply demonstrate. But even those confession cases that present no evidence of physical brutality involve wrongs to the suspect of an entirely different order of seriousness from many of those arising out of technical violations of the Fourth Amendment, now bodily "incorporated" into the Fourteenth. The confession cases . . . involve more than police illegality. Those that apply the modern Court's expanded version of the confession rule require evidence of serious wrongs or substantial unfairness. Interestingly enough, the processes of constitutional adjudication in the confession cases are essentially those urged by Mr. Justice Frankfurter and rejected by the [*Irvine* Court]. To some, Mr. Justice Clark's argument based on the analogy of the confession cases may, again, appear more persuasive when directed to the overthrow of *Irvine* than of *Wolf*.⁵⁴

The calm judgment, fairmindedness, and farsightedness that Allen demonstrated in his studies of the *Wolf* and *Mapp* cases are characteristic of all his writing on criminal procedure — a field not overpopulated by those who "turn up their collars against windy sloganeering, no matter from which direction it is blown."⁵⁵

Very early in his career, Allen recognized that the Court had not

53. 367 U.S. at 656-57 (citations omitted).

54. Allen, *supra* note 38, at 31-32 (footnotes omitted). Whether or not Allen so intended, his observations provide some support for the kind of "good faith" modification of the exclusionary rule the Court was to adopt more than twenty years later in *United States v. Leon*, 468 U.S. 897 (1984), briefly discussed in note 26 *supra*. Moreover, so long as the exclusionary rule is binding on the states and so long as the fourth amendment applies to the states in all its rigor, Allen's observations — again, whether or not they were so intended — suggest the need for and desirability of a less demanding "probable cause" test, the kind of "practical, common-sense" "flexible, easily applied" *something less* than more-probable-than-not standard the Court was to embrace in *Illinois v. Gates*, 462 U.S. 213 (1983).

55. Cf. P. FREUND, *The Court and Its Critics*, in *THE SUPREME COURT OF THE UNITED STATES* 171, 189 (1961).

dealt satisfactorily with the serious problems raised by secret police interrogation⁵⁶ and that "the whole modern history of the confession rule . . . has been characterized by ambiguity as to what purposes the rule is intended to achieve and what interests it is designed to protect."⁵⁷ But long before *Escobedo*⁵⁸ and *Miranda*⁵⁹ — indeed, a year before Earl Warren was named Chief Justice — Allen warned:

[I]t is clear that further expansions of the confession rule are likely to come in conflict with police practices regarded by virtually all law enforcement officials as necessary and legitimate. Furthermore, insofar as these practices do not involve violence or other methods . . . calculated to induce an innocent man to confess falsely, the attitude of the police is likely to be supported by a considerable segment of public opinion. Resistance and practical nullification of the Court's efforts may be expected to follow⁶⁰

This same foresight characterized Allen's early work on indigent criminal defendants. However surprising it may seem today, when first handed down thirty years ago *Griffin v. Illinois*,⁶¹ holding that all indigent felony defendants must be furnished a trial transcript at state expense if such a transcript is necessary to effectuate appellate review, "produced much disquiet and criticism throughout the country."⁶² But Allen maintained, quite correctly, that *Griffin* "is squarely in the main current of an important development . . . [that] has been steadily unfolding for a generation and more."⁶³ Moreover, he added, again quite correctly, that *Griffin* "hardly scratches the surface."⁶⁴

56. Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U. L. REV. 16, 33-35 (1953).

57. *Id.* at 18.

58. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

59. *Miranda v. Arizona*, 384 U.S. 436 (1966).

60. Allen, *supra* note 56, at 34 (footnote omitted). "If the problem cannot be solved through indefinite expansion of the confession rule," added Allen, "it is a problem which must be solved in other ways." *Id.* at 34-35. He suggested, *inter alia*, "acceptance of some variant of the recommendations of the Wickersham Commission calling for public interrogation of suspects by a magistrate after arraignment and the admissibility of answers to those questions as evidence against the defendant." *Id.* at 35. In this regard, see W. SCHAEFER, *THE SUSPECT AND SOCIETY* 76-81 (1967); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713-16 (1968); Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later — Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974).

61. 351 U.S. 12 (1956).

62. Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 198 (1958).

63. Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 156 (1957).

64. Allen, Book Review, 24 U. CHI. L. REV. 779, 781 (1957).

In the decade and a half following *Griffin*, its underlying principle was broadly applied. *Douglas v. California*, 372 U.S. 353, 355 (1963), viewed denial of counsel to an indigent appellant as "a discrimination at least as invidious as that condemned in *Griffin*," and *Mayer v. Chicago*, 404 U.S. 189 (1971), carried the *Griffin* principle further than the Court ever carried the *Gideon* principle by holding that an indigent appellant cannot be denied a record of sufficient completeness to permit proper consideration of his claims even though he was convicted of ordinance

Allen recognized, however, that one difficulty with the rationale that justice cannot turn on the amount of money a defendant has is that "it contains no very obvious limiting principle."⁶⁵ He suggested an analysis that "sounds more in 'due process' than in 'equal protection'"⁶⁶ — an analysis the present Court now seems to be utilizing.⁶⁷

Allen's intellectual rigor and distaste for overstatement and oversimplification is evidenced more generally by his views on the Warren and Burger Courts — and by his reaction to other commenta-

violations punishable by fine only. More generally, a number of cases seemed to read *Griffin* for the proposition that an indigent defendant must be furnished any valuable or useful "tool" or "instrument" available for a price to others. See, e.g., *Britt v. North Carolina*, 404 U.S. 226 (1971); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966).

The *Griffin-Douglas* "equality principle" was finally given a grudging reading in *Ross v. Moffitt*, 417 U.S. 600 (1974) (also discussed in note 67 *infra*), which declined to recognize a constitutional right to appointed counsel for *discretionary* review by a state supreme court. But a decade later, the Court broke its thirty-year silence on the issue of an indigent defendant's right to a psychiatrist and other expert assistance and held that, at least when an indigent defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the state must provide the assistance of a psychiatrist for his defense. *Ake v. Oklahoma*, 470 U.S. 68 (1985). For a helpful effort to define the boundaries of the indigent defendant's right to expert assistance in the light of *Ake*, see Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326 (1986). The Note concludes that "[the *Ake* case's] logic must lead to the recognition of a constitutional right, where a minimum showing of need has been made, in capital and noncapital cases alike, to the assistance as 'defense consultants' of all types of experts needed to provide the 'basic tools of an adequate defense.'" *Id.* at 1362.

65. Allen, *supra* note 62, at 198.

66. *Id.* at 199.

67. As I have observed elsewhere, Kamisar, *Poverty, Equality and Criminal Procedure: From Griffin v. Illinois and Douglas v. California to Ross v. Moffitt*, in NATIONAL COLLEGE OF DISTRICT ATTORNEYS, CONSTITUTIONAL LAW DESKBOOK 1-79, 1-101 to 1-104 (1977), the most significant feature of *Ross v. Moffitt*, 417 U.S. 600 (1974), is that the majority's so-called "equal protection analysis" really amounts to a "due process analysis":

[The *Ross*] "equal protection" analysis . . . seems to put to one side the admitted fact that an indigent seeking discretionary review is "somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him" and focuses instead on whether an indigent seeking discretionary review without counsel has a "meaningful opportunity" (emphasis added) . . . to present his claims in the state supreme court . . . regardless of whether a wealthy defendant who has counsel at this stage has a *significantly better* opportunity to present his claims . . .

. . . . What [*Ross*] really seems to be asking, and deciding, is whether [without the assistance of a lawyer] an indigent in respondent's circumstances has a *fair chance*, a *fighting chance* (or the requisite *minimum* chance), to get the attention of the state supreme court. This . . . is "due process," not "equal protection," reasoning.

See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1118-19 (1978); Note, *supra* note 64, at 1335-36; Recent Decision, 49 GEO. WASH. L. REV. 191, 198-205 (1980). But see Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1334-36 (1977).

Post-*Ross* cases confirm the Court's tendency to rely on due process rather than on equal protection analysis in ascertaining the constitutional rights of indigent criminal defendants. Thus, in *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985), the Court reaffirmed the need for the state to take steps to assure that an indigent defendant has "a fair opportunity" or "an adequate opportunity" to present his defense. See also *Evitts v. Lucey*, 469 U.S. 387, 403-05 (1985); *Bearden v. Georgia*, 461 U.S. 660, 665-67 (1983); *United States v. MacCollom*, 426 U.S. 317, 324 (1976).

tors' views of these Courts. Allen had no particular affection for the Burger Court, but he was even less fond of those critics of that Court whose work "take[s] on angry and apocalyptic tones."⁶⁸ He considered "the Burger Court, even in the criminal cases . . . a more complex phenomenon than often represented by its critics."⁶⁹ He did not deny that "the values given priority by a majority of the present Court diverge drastically from those expressed in the Warren years."⁷⁰ Nonetheless —

it is well to recall that many of the most distinctive tendencies of the Burger Court had their origins in the closing years of Earl Warren's tenure when the country was oppressed by fear of the possible collapse of public order. That the Burger Court frequently fails to reach acceptable levels of craftsmanship, skimps the hard tasks of rational persuasion, and is obsessed with achieving certain policy objectives, seems demonstrable. But these sins were not invented by the Burger Court.⁷¹

Moreover, and more fundamentally —

What our recent experience does again demonstrate is the danger of relying so heavily as we have in the past upon the Supreme Court as the instrumentality to achieve efficiency and decency in the administration of American criminal justice. Many of those most appalled by . . . the Burger Court have shirked the battle in the political and legislative arena. However difficult the conflict may prove to be, it is there that a large share of the effort must be expended in the years immediately ahead. In the meantime . . . [o]ne hopes that the criticism [of the Burger Court] will be both rational and reasonably temperate, for extravagance of language can threaten the long-term vitality of the institution. This would be unfortunate, for we may need the Court again some day.⁷²

Allen must have welcomed much of the Warren Court's so-called "revolution" in American criminal procedure. After all, a large part

68. Allen, *Foreword — Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & CRIMINOLOGY 391, 396 (1975).

69. *Id.* at 398. This may explain why, depending on the particular time, even the same critic's appraisal of the Burger Court's work in the criminal procedure field varies significantly. Compare, e.g., Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (V. Blasi ed. 1983), with Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS* 143 (H. Schwartz ed. 1987).

70. Allen, *supra* note 68, at 399.

71. *Id.* (footnote omitted). The distinctive tendencies of the Burger Court that had their origins in the closing years of the Warren Court, added Allen, perhaps include: the "stop and frisk" case, *Terry v. Ohio*, 392 U.S. 1 (1968); the failure of the Court to maintain the exclusionary rule on a principled basis; the failure to explore the implications of its holding in *Katz v. United States*, 389 U.S. 3247 (1967); and the failure to deal adequately with the "waiver" problem in formulating and administering the *Miranda* rule.

Allen, *supra* note 68, at 399 n.79.

72. Allen, *supra* note 68, at 399; see also Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810 (1970).

of that Court's work "consisted of its efforts to revitalize the adversary process in those parts of the system in which it was always supposed to flourish."⁷³ More generally, that Court sought to reshape American criminal justice "in the interest of a larger realization of the constitutional ideal of liberty under the law."⁷⁴ Nevertheless —

It is important . . . not to canonize the Warren Court and not to regard its works as sacrosanct. It was often wrong and wrongheaded. It frequently failed to articulate its decisions adequately and sometimes appeared to doubt the importance of adequate articulation. It was frequently self-righteous and intolerant of competing considerations. At times [as in the *Mapp* case, when it overruled *Wolf* even though the latter case was not cited in the appellant's brief] it flouted the Court conventions when adherence to them would have cost little and might have marshalled greater support for the innovations it was effecting. Strangely enough, one of the most serious criticisms of the Court is that often, having embarked upon a problem it did not go far enough. This was true not only in *Miranda*. The Warren Court failed to realize its opportunity to place the law of entrapment on a more satisfactory footing . . . Having struggled its way to a new and more useful approach to [what constitutes a "search" within the meaning of the fourth amendment] in *Katz v. United States*, it failed to pursue the implications of its insight. Sometimes its conflicting motivations appeared paradoxical. In the same period that it was pursuing innovations in the area of pretrial interrogation that many warned were threatening the effectiveness of law enforcement, it stubbornly defended in the name of law enforcement the use of undercover agents and resisted efforts to restrict and regulate their activities.⁷⁵

"The central problem of the Warren Court's activism," as Allen saw it, was "not that it threatened serious abuses of power by politically irresponsible judges."⁷⁶ Rather —

it was simply that, despite the Court's ingenious, persistent, and, some may feel, heroic efforts to overcome the inherent limitations of judicial power, the Court attempted more than it could possibly achieve. Moreover, the attempt incurred costs. The Court was unable to see the problems of criminal justice in their full complexity. While concentrating on the vindication of individual rights, the Court was unable to offer any contributions to the staggering problems created for the system of criminal justice by the weight of numbers — both numbers of crimes and numbers of persons processed by the system. Indeed, much of what it

73. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 530.

74. *Id.* at 525.

75. *Id.* at 539-40 (footnotes omitted); see also Amsterdam, *supra* note 72, at 797-803; Loewy, *The Warren Court as Defender of State and Federal Criminal Laws*, 37 GEO. WASH. L. REV. 1218, 1231-42 (1969); Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 265-66 (1968).

76. Allen, *supra* note 73, at 540.

did exacerbate those problems.⁷⁷

But Allen has little doubt that, whatever the shortcomings in its work and whatever the diversions or retreats from its precedents by future Courts, the influence of the Warren Court will long endure:

By reason of what the Warren Court said and did, we now perceive as problems what too often were not seen as problems before. This is the dynamic of change, and that fact may well be more significant than many of the solutions proposed by the Warren Court. The critique of American criminal justice implicit in the opinions of the Warren era was essentially ethical. Barring cataclysmic upheavals in American life even more devastating than those we anticipate, one expects this ethical insight to persist and to provide guidance in the years ahead.⁷⁸

As his masterly studies of the *Wolf*, *Mapp*, and *Griffin* cases amply demonstrate, Allen can dissect cases with meticulous care and great insight. But he can also place an important development in the sweep of history. He is, to borrow a phrase, master of the telescope as well as the microscope.⁷⁹

Thus, after suggesting various reasons (e.g., the reform of the Court's jurisdiction in the 1920s, the Report of the Wickersham Commission in 1931) why the modern law of constitutional criminal procedure did not really begin until the Court handed down *Powell v. Alabama*⁸⁰ in 1932, almost sixty-five years after the adoption of the fourteenth amendment,⁸¹ Allen went on to say:

Perhaps it is worth noting that the decision of the *Powell* case and the rise of Hitler to power in Germany occurred within the period of a single year. It would, of course, be facile and specious to suggest that the two occurrences are related by any direct causal connection. Yet, perhaps, in some larger sense the two events may be located in the same current of history. Both occurrences are encompassed in the crisis of individual liberty which has confronted the western world since the first world war. The Court has been sensitive to the crisis and has responded emphatically to it. It is not only in the state criminal cases that constitutional doctrine has expanded at a remarkable rate. Virtually all of the law of free speech, assembly and press, for example, has been articulated in the last forty years. . . . [I]t is apparent that the Court has seen the state criminal cases as one aspect of the modern problem of individual liberty. What the Court has done can only be understood in this light. The search for "civilized standards" of criminal procedure is quite apparently

77. *Id.* at 540-41; see also Weigend, *Continental Cures for American Ailments: European Criminal Procedure as a Model for Law Reform*, 2 CRIME & JUST. 381, 418-23 (1980).

78. Allen, *supra* note 73, at 539.

79. Cf. Hughes, *Mr. Justice Brandeis*, in MR. JUSTICE BRANDEIS 1, 3 (F. Frankfurter ed. 1932).

80. 287 U.S. 45 (1932).

81. See Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 195-96 (1958).

related to the conviction that the distinguishing feature of the free society is less its immediate objectives and more the methods by which those objectives are attained.⁸²

After speculating about the reasons for "the loss of impetus by the Warren Court in the closing years of the Chief Justice's tenure"⁸³ (e.g., strong resistance throughout the Court's expansionist phase by a determined minority on the Court, limitations inherent in the traditions of court adjudication that render it difficult to promulgate and apply broad categorical rules exacting substantial social costs),⁸⁴ Allen continued:

But surely the most fundamental reasons for the Court's loss of impetus lies in the social and political context of the Court in the late 1960's. That period was a time of social upheaval, violence in the ghettos, and disorder on the campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were represented simply as a war between the "peace forces" and the "criminal forces." The decision in *Miranda* evoked a chorus of criticism of the Court, ranging from the excited to the psychotic. Congress responded with the Omnibus Crime Control and Safe Streets Act of 1968, some provisions of which were obviously retaliatory. These events combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.⁸⁵

Only recently, Allen viewed current American attitudes on capital punishment as "part of a larger social current":

The suddenness and magnitude of the shift [toward increasing public support for the death penalty] . . . in the past decade and a half is rivaled only by a similarly precipitous loss of faith in penal rehabilitationism as the guiding ideal and objective of American criminal justice. Few will doubt that the two are related phenomena.⁸⁶

* * *

That [the] assertion of retributive values [in support of the death penalty] does indeed capture the mood and conviction of many thoughtful people today seems apparent. What is as yet unexplained is why the assertion today proves persuasive to persons who would have rejected it as recently as a decade ago. Crimes flourished in the last two decades, but criminal violence was not an invention of the 1970's. And, . . . many of the circumstances surrounding capital punishment have remained largely constant in the interval. The explanation that comes to mind is hardly startling. It is that the mood and thought of the intellectuals, like

82. *Id.* at 196.

83. Allen, *supra* note 73, at 538.

84. *See id.*

85. *Id.* at 538-39 (footnotes omitted).

86. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 318 (1985) (footnote omitted).

those of the man or woman in the street, are in significant part products of the ethos of the times, of the *zeitgeist*.⁸⁷

* * *

We appear to be passing through a time in which, because of frustration and disappointments, we are increasingly inclined to rely on the launching of deadly force as a principal means for eliminating our various dissatisfactions. Such has surely been the recent trend of our external policy, as it also has been of our penal policy. Given the cyclical nature of such movements of mood and attitudes in our history, one may be justified in assuming that the time will come when we shall be sated with the uses of deadly force and may again be permitted to consider more moderate means. Nothing in the advance sheets, however, suggests when that time may arrive.⁸⁸

A final word about Frank Allen. I cannot think very long about his nearly forty years of teaching, writing, and service in various good causes without recalling an article on legal education written by his one-time colleague, Brainerd Currie. If the law schools' aspirations are attainable at all, wrote Professor Currie, the way is not through formal arrangements alone, "but through concentration on . . . an 'indefinable fundamental.'" ⁸⁹ He continued:

As the expression confesses, I do not know quite what [an "indefinable fundamental"] means. I believe it means, for one thing, that training for professional responsibility and for awareness of the role of law in society is not a matter that can be parceled out and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time. It means that we should be less concerned with seeking new things to do than with doing better the things we already do fairly well. It means that we should confront, and bring our students to confront, the most explosive problems with which law may deal, facing all the facts and plumbing all the issues to their full depth without fear or prejudice. It means that each law teacher should joyfully accept with Holmes the challenge that in his work he may "wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."⁹⁰

87. *Id.* at 321.

88. *Id.* at 323 (footnote omitted). In preparing for this article, Allen read some two thousand advance sheets in criminal cases — on the chance "they may have important things to say about the condition and prospects of American society." *Id.* at 312. Allen contended, as he had on other occasions, that "law can serve as a path to the world." *Id.* "[F]ollowing that path entails close attention to the traditional legal materials." *Id.*

89. Currie, *Law and the Future: Legal Education*, 51 NW. U. L. REV. 258, 271 (1956).

90. *Id.* (quoting O.W. HOLMES, *The Profession of the Law*, in SPEECHES BY OLIVER WENDELL HOLMES 22, 23 (1918)).